No. 91-1744

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In the Supreme Court of the United States

OCTOBER TERM, 1992

GALAXY COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's (FCC) award of a qualitative enhancement for minority ownership in a comparative licensing proceeding violates the Due Process Clause of the Fifth Amendment.

2. Whether the FCC erred in affirming the administrative law judge's determination that the limited partners of an applicant for a radio license would be insulated from the conduct of the radio station's business.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 957 F.2d 873. The decisions of the Federal Communications Commission, Pet. App. 16a-28a, the Review Board, Pet. App. 29a-71a, and the administrative law judge, Pet. App. 72a-93a, are reported at 6 F.C.C. Rcd. 721, 5 F.C.C. Rcd. 2432, and 4 F.C.C. Rcd. 5687, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1992. The petition for a writ of certiorari was filed on April 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, an administrative law judge (ALJ) conducted comparative hearings on the mutually exclusive applications of petitioner Galaxy Communications, Inc. (Galaxy) and three other applicants—Anchor Broadcasting Limited Partnership (Anchor), Selbyville Broadcasting Company (SBC), and Susan M. Bechtel—all of whom were seeking a license to operate a new FM radio station in Selbyville, Delaware. Pet. App. 73a. In determining which of the applications would best serve "the public interest, convenience, and necessity," 47 U.S.C. 309(a), the ALJ applied the criteria found in the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) (*1965 Policy Statement*). Those criteria broadly equate the public interest with the "best practicable service" and "maximum diffusion of control" of the mass media. The Federal Communications Commission (FCC) has implemented the goals of the *1965 Policy Statement* in part by giving a "comparative coverage" preference to applicants whose signals will reach a broader area or a larger number of persons, and an "integration" preference to applicants whose owners will be full-time participants in management. See Pet. App. 3a. An applicant with nonparticipating owners may still obtain a full integration credit if the passive owners are insulated from the licensee's business affairs and exercise no control over the licensee. See *ibid.*

In this case, the ALJ awarded Galaxy and Bechtel "very slight" comparative coverage preferences because each of them would cover approximately 20% more total population than the other two applicants. Pet. App. 85a, citing *Resort Broadcasting Co.*, 41

F.C.C.2d 640, 647 (Rev. Bd. 1973).[1] Anchor received a full integration credit because the ALJ found that Anchor's sole general partner, Herman Stamps, would manage the station, while Anchor's limited partners would have no role in or control over the business of the station.[2] The ALJ also awarded Galaxy a full integration credit. Pet. App. 88a-89a. SBC and Bechtel received no such credit. *Id.* at 87a-89a.

The ALJ granted Anchor's application. In so doing, the ALJ focused on Anchor and Galaxy, because each was entitled to full integration credit and had no comparative demerits.[3] He concluded that Anchor's integration credit was qualitatively enhanced by Anchor's minority ownership (based on the minority status of its general partner, Stamps) and Stamps's proposal to move to Selbyville. In addition, Anchor was awarded a credit for its proposal to install auxiliary power. Pet. App. 87a, 89a. The ALJ found that those enhancements and that credit outweighed (1) Galaxy's enhancements for its sole

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[1] Galaxy's application proposed to serve 39,753 persons, Bechtel's 40,465, Anchor's 33,350, and SBC's 33,644. Pet. App. 74a.

[2] The ALJ rejected contentions of competing applicants that Stamps's lifestyle, multiple residences, and advanced age undercut his asserted commitment to manage the station. The ALJ also declined to credit the claim that the limited partnership was a "sham." He noted that the partnership agreement restricted the limited partners to a passive role and that the partners had all testified that they would adhere to the provisions of the agreement. Pet. App. 86a-87a. The ALJ found "no reason to question the sincerity of their pledges." *Id.* at 87a.

[3] SBC received a "diversification" demerit because the spouse of its owner owned a 15% interest in a new radio station in New York. Pet. App. 85a.

owner's recently acquired local residence in Selbyville and the owner's "*de minimis* * * * involvement" in civic activities and (2) Galaxy's credits for auxiliary power and comparative coverage. *Id.* at 89a.

2. A divided Review Board reversed. Pet. App. 29a-71a. The Board concluded that, notwithstanding the terms of Anchor's limited partnership agreement, the record did not support the limited partners' pledge to be insulated from the management of the station. The Board cited the limited partners' active role in an earlier application for a different license, and testimony by one of the limited partners that he was unaware of the present agreement's strict prohibition against his discussing the station's management. The Board also expressed concern that Stamps's testimony was "evasive" with respect to the role of the limited partners in station management. *Id.* at 44a-45a.[4] Accordingly, the Board determined that "Anchor has not carried its burden of rebutting the 'inevasible doubts' that they will operate at arms length; it has conversely compounded them." *Id.* at 45a.[5]

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[4] At the hearing before the ALJ, Stamps answered a question about the "actual relationship" among the partners in part by saying: "I am afraid to answer that question because I know what is expected of me by law." Pet. App. 35a (emphasis omitted). He added, "I mean there's a real world and then there's this. Right here, I am going by this." *Ibid.* (emphasis omitted). When asked whether he "realistically" expected to discuss the station's affairs with his limited partners, Stamps replied: "I don't know which amendment there is about possible self-incrimination, but I certainly wouldn't answer 'yes.'" *Id.* at 35a-36a (emphasis omitted).

[5] The Board also declined to credit Stamps's pledge to relocate to Selbyville to manage the new station. It noted that Stamps had several current homes (none of which was in Selbyville), that Stamps had been "cryptic[]" with respect to his intention to relocate, and that he would not even predict

Finding that Galaxy was therefore the only applicant meriting a full integration credit, the Board held that Galaxy "must prevail" over Anchor, because "a clear quantitative 'integration' advantage cannot be overcome by various qualitative attributes." Pet. App. 53a.

3. The Commission reversed the Board and reinstated the ALJ's decision granting Anchor's application. Pet. App. 16a-28a.[6] The Commission concluded that "the Board took Stamps's testimony out of context and it failed to consider that, although Stamps recognized that the relationship between the partners made it difficult to insulate them from the proposed station's business, he will adhere to the insulation requirements." *Id.* at 18a; see *id.* at 21a. The Commission also found from the testimony before the ALJ that "Anchor's limited partners have demonstrated that they understand their obligations and intend to remain insulated from involvement in the management of its proposed station." *Id.* at 21a.[7]

4. On appeal, the court of appeals affirmed the decision to award the full integration credit to Anchor. The court found "substantial evidence on the

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where his residence would be. Pet. App. 46a. The Board also found Stamps's representations concerning his Virginia tax domicile "flatly inconsistent with his pledge to relocate his prime residence to Selbyville." *Ibid.*

[6] In the proceedings before the Commission, applicant Bechtel argued that the Commission's integration preference should be abandoned; the Commission concluded that "such a change in the comparative criteria would more appropriately be [considered in] a rule making proceeding." Pet. App. 27a n.4.

[7] The Commission also disagreed with the Board concerning Stamps's pledge to reside in Selbyville. Pet. App. 23a-25a.

whole record" to support the FCC's conclusion that Anchor's partnership agreement and the testimony of its partners "established *de jure* legal authority consistent with FCC integration and insulation requirements and a credible commitment to act in accordance with that authority." Pet. App. 8a. The portions of the record upon which petitioner relied were, in the court's view, largely "irrelevant or subject to more than one reasonable interpretation." *Id.* at 9a. The court emphasized, moreover, that the petitioner's contentions related to the credibility of Anchor's partners and that the ALJ was in the best position to evaluate the credibility of their explicit promises to operate the station consistently with the Commission's integration policy. *Ibid.* In those circumstances, the Court found it "especially" appropriate to defer to the Commission's evaluation of the record. *Id.* at 7a-8a, citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496-497 (1951).

Petitioner also claimed, notwithstanding this Court's recent decision in *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997 (1990), that giving Anchor a dispositive preference because of its minority ownership was unconstitutional. The court of appeals, however, concluded that this claim was not properly before it because petitioner had not presented it to the Commission. Pet. App. 7a n.4 (citing 47 U.S.C. 405(a); *Southern Indiana Broadcasting, Ltd.* v. *FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991)).

Finally, applicant Bechtel argued on appeal that the Commission's policy of giving an integration preference had been undercut by regulatory changes occurring after the adoption of the integration policy. Specifically, the Commission's 1981 decision to allow full integration credits despite the presence of passive owners made it possible to obtain a full in-

tegration credit even though only a fraction of the ownership was represented in management. And by adopting in 1982 a policy allowing licensees to sell their stations after a year of operation, the Commission effectively shortened the required duration of any integration. These regulatory developments, Bechtel claimed, eviscerated the original rationale for the integration preference. Pet. App. 11a-12a. Noting that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so," *id.* at 14a, and that the Commission had declined to address Bechtel's arguments, the court remanded the case to the Commission for it to respond to Bechtel's arguments and to reconsider her application in light of those arguments. *Id.* at 13a-15a.

ARGUMENT

1. Petitioner renews its contention that notwithstanding *Metro Broadcasting, Inc.* v. *FCC*, *supra*, the Commission's minority preference policy, as applied here, violates the Due Process Clause of the Fifth Amendment because Anchor effectively received a "*per se* preference" based on the race of its principals. Pet. 10. Petitioner also questions the validity of *Metro Broadcasting*. Pet. 12-15. For several reasons, petitioner's claim does not merit further review.

a. Because petitioner did not raise its constitutional claim before the Commission, the court of appeals properly declined to consider that claim, Pet. App. 7a n.4, and it is not properly before this Court. Under 47 U.S.C. 405(a), "[t]he filing of a petition for reconsideration shall not be a condition precedent to judicial review * * *, except where the party seeking such review * * * relies on questions of fact or law upon which the Commission, or designated au-

thority within the Commission, has been afforded no opportunity to pass." It is undisputed that Section 405 codifies an exhaustion requirement, see *Southern Indiana Broadcasting, Ltd.* v. *FCC*, 935 F.2d 1340, 1342 (D.C. Cir. 1991); *Northwestern Indiana Tel. Co.* v. *FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989), and that petitioner failed to raise its constitutional claim before the Commission. However, petitioner alleges, Pet. 16-17, that presenting its constitutional claim to the Commission would not have served the purposes of exhaustion because a series of appropriations Acts have forbidden the FCC "to repeal, to retroactively apply changes in, or to continue a reexamination of, [its] policies * * * with respect to comparative licensing * * * to expand minority and women ownership of broadcast licenses." Act of Dec. 22, 1987, Pub. L. No. 100-202, § 409, 101 Stat. 1329-31.[8] According to petitioner, presenting its challenge to the FCC would have been futile because the Commission could not have declared the challenged policy or appropriations riders unconstitutional.

While it is of course true that a party need not exhaust remedies when doing so would be futile, see, *e.g.*, *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 587 (1989), that exception to the exhaustion requirement does not excuse petitioner's failure to raise its constitutional claim here. Petitioner principally claims that the FCC's minority preference policy, *as applied to this case*, is unconstitutional because it effectively resulted in a per se minority preference in favor of Anchor. Pet. 8-11. Had petitioner

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[8] See also Act of Oct. 1, 1988, Pub. L. No. 100-459, § 407, 102 Stat. 2216-2217; Act of Nov. 21, 1989, Pub. L. No. 101-162, § 405(d), 103 Stat. 1020-1021; Act of Nov. 5, 1990, Pub. L. No. 101-515, § 404(b), 104 Stat. 2136-2137; Act of Oct. 28, 1991, Pub. L. No. 102-140, § 112, 105 Stat. 797.

raised its claim administratively, the Commission would have been able to respond to the contention that it applied a "*per se* preference" in this case. If the Commission had concluded that a per se preference had been awarded, it would then have been able to address whether the appropriations Acts could be narrowly interpreted to avoid the constitutional question presented if the Acts in fact require such a preference to be applied. Even if the Commission were to have found that the appropriations Acts leave no room to remedy the claims raised by petitioner, the court of appeals would have benefited from the agency's interpretation of its own appropriations Acts as applied to the circumstances of this case. Thus, in the circumstances of this case, exhaustion was still required. See *Thetford Properties IV Ltd. Partnership* v. *U.S. Department of Housing & Urban Development*, 907 F.2d 445, 448 (4th Cir. 1990) ("even though HUD cannot rule on the Act's ultimate constitutionality, exhaustion will nonetheless be an important step if a reviewing court must make that determination"); *Hastings* v. *Judicial Conference of the United States*, 829 F.2d 91, 103 (D.C. Cir. 1987) (constitutional claim should have been exhausted; "the authorities charged with administration of the Act should at least have an opportunity to construe the Act in a manner that comports with the Constitution"); see also *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990).

b. Even if exhaustion had not been required, the issue presented by petitioner was decided by this Court two Terms ago in *Metro Broadcasting*. There, the Commission argued that its use of racial preferences in comparative licensing was the product of a

deliberate choice by Congress,[9] and that Congress made that choice based on sufficient evidence that minorities have been severely underrepresented in the broadcast media. FCC Br. at 18-27, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453 (89-453 FCC Br.). Relying in part on *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-319 (1978) (opinion of Powell, J.), the Commission contended that there is a compelling governmental interest in promoting diversity of ideas and expression, and that that interest justifies the use of race-conscious policies in broadcast licensing. 89-453 FCC Br. at 27-32. The use of racial preferences was, in the Commission's view, narrowly tailored to promote diversity, because (a) race was used merely as a plus factor; (b) evidence showed a connection between race and programming content; (c) the FCC had previously tried race-neutral means of promoting diversity; and (d) the policy did not unduly burden nonminorities. *Id.* at 38-49.[10]

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[9] The Commission cited, 89-453 FCC Br. at 19, the appropriations riders that have prohibited the FCC from repealing, retroactively applying changes in, or continuing to reexamine its minority preference policies. See p. 8 & note 8, *supra*. The Commission also noted, 89-453 FCC Br. at 19, that when Congress in 1982 adopted a random selection method of awarding some broadcast licenses, it specifically required that any such scheme include significant preferences for minorities. See Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115(c)(2), 96 Stat. 1094-1095.

[10] In a companion case, *Astroline Communications Co.* v. *Shurberg Broadcasting Inc.*, No. 89-700, the FCC took a similar position with respect to its policy of using race as a factor in distress sales (*i.e.*, the assignment of a broadcast license by a licensee who is in danger of having its license revoked or not renewed).

The United States filed a brief *amicus curiae* supporting the petitioner in *Metro Broadcasting*. The United States argued that the use of a racial classification by the federal government was subject to strict scrutiny. U.S. Br. at 12-17, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453 (89-453 U.S. Br.). Noting that this Court had recognized only the remediation of past discrimination as a compelling basis for using racial classifications, the United States argued there was insufficient record evidence of past discrimination in awarding broadcast licenses to justify race-conscious relief. 89-453 U.S. Br. at 20-22.[11] In addition, the United States contended that the Commission's policy was not narrowly tailored because neither Congress nor the FCC had attempted race-neutral remedies, and the comparative licensing process did not accommodate an inquiry into whether a particular minority applicant had been disadvantaged. *Id.* at 22-23. Finally, the United States attacked the diversity rationale because it requires a "type of racial stereotyping [that] is anathema to fundamental constitutional principles." *Id.* at 25.[12]

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[11] The United States also contended that Congress had not made any authoritative determination that the FCC's racial preference was needed to rectify past discrimination; at most, the appropriations riders relied on by the Commission "direct that the status quo be maintained with respect to the Commission's policies—policies that have always been grounded in the 'programming diversity' rationale, rather than in any finding of prior discrimination." 89-453 U.S. Br. at 19 (emphasis omitted). The United States noted, moreover, that nothing in the 1982 lottery legislation required the use of race in comparative proceedings. *Id.* at 19 n.11.

[12] The United States also filed a brief *amicus curiae* challenging the FCC's minority distress sale policies in *Astroline Communications Co.* v. *Shurberg Broadcasting Inc.*, No. 89-700.

This Court upheld the FCC's use of racial preferences, reasoning that "benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." 110 S. Ct. at 3008-3009 (footnote omitted). The Court found that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies." *Id.* at 3010. The Court concluded, moreover, that the use of minority preferences in comparative proceedings is substantially related to the goal of promoting broadcast diversity. The Court found that Congress and the FCC had determined that increasing minority ownership would increase programming diversity, *id.* at 3011-3016, and that their judgments were "corroborated by a host of empirical evidence," *id.* at 3017. With respect to tailoring, the Court found that the FCC's racial preferences were adopted "only after long study and painstaking consideration of all available alternatives," *id.* at 3019; that the FCC's policy was "aimed directly at the barriers that minorities face in entering the broadcasting industry," *id.* at 3024; and that it did not place "impermissible burdens" on nonminorities, *id.* at 3025.[13]

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[13] Justice O'Connor, joined by the Chief Justice and Justices Scalia and Kennedy, dissented. See 110 S. Ct. at 3028. The dissent argued that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity

Contrary to petitioner's contention, Pet. 10-11, *Metro Broadcasting* fully disposes of its due process claim. Although the minority preference here was outcome determinative, nothing in the reasoning of *Metro Broadcasting* supports petitioner's imaginative position that the Court approved the use of minority preferences only where they made no difference to the outcome of a comparative proceeding.[14] Accordingly,

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determines how they act or think." *Id.* at 3029. Reasoning that strict scrutiny was the applicable standard, *id.* at 3029-3033, the dissent noted that modern equal protection case law has recognized only one interest sufficiently compelling to justify race-conscious government action—"remedying the effects of racial discrimination." *Id.* at 3034. The dissent rejected broadcast diversity as a sufficient justification for race-conscious government action, *id.* at 3036, and found that, in any case, "[t]he chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored." *Id.* at 3037. Justice Kennedy also filed a separate dissent joined by Justice Scalia. *Id.* at 3044-3047.

[14] Indeed, the Court in *Metro Broadcasting* appears to have regarded the minority preference as dispositive. See 110 S. Ct. at 3005-3006 ("The Review Board found that Rainbow's minority credit outweighed Metro's local residence and civic participation advantage."). Petitioner emphasizes, Pet. 8, that the Review Board in *Metro Broadcasting* stated that Rainbow's quantitative advantage was "probably a 'clear' enough difference to be decisional." *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 703 (Rev. Bd. 1984). But the Board's statement, when quoted in full, shows that qualitative factors (such as race) might also have been dispositive: "Rainbow is quantitatively ahead of Metro, and while its * * * advantage *is probably* a 'clear' enough difference to be decisional, * * * we conclude that it is ahead qualitatively." *Ibid.* (emphasis added). Because the Court made no effort to determine whether the license could have been awarded to Rainbow

unless this Court were to accept petitioner's invitation to reconsider *Metro Broadcasting*, petitioner's claim must fail on the merits.

c. Even if the issue were properly presented, and the Court were inclined to revisit the question decided in *Metro Broadcasting*, further review would be unwarranted in the interlocutory posture in which this case now stands. A third applicant, Susan M. Bechtel, persuaded the court of appeals that the Commission had insufficiently considered her claim that the use of a quantitative integration credit was no longer justified. Accordingly, the court remanded the case to the FCC "to respond to Ms. Bechtel's challenges and to consider her application in light of those challenges." Pet. App. 15a. If the ultimate resolution of the proceedings on remand leads to the elimination of the FCC's integration policy, which favored both Anchor and petitioner over Bechtel, it is possible that the license will go to a licensee other than Anchor in any case. Hence, minority preferences may ultimately cease to be an issue in this case.

2. Petitioner also argues that the Commission erred in granting Anchor the integration credit, given the testimony that Stamps gave before the ALJ. Pet. 17-21. The Commission, however, properly concluded that, on the record as a whole, there was substantial evidence to support the ALJ's conclusion that Anchor's limited partners will be insulated from Anchor's operation. Pet. App. 17a-26a. As the court of appeals correctly determined, petitioner's challenge to Anchor's integration credit "really goes to the credibility of

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absent the minority preference, it is evident that the Court's analysis did not turn on whether such a preference was dispositive.

Anchor's partners." Pet. App. 9a. Because the court properly deferred to the Commission, whose decision was consistent with the ALJ's credibility determinations, *id.* at 7a-8a, further review of that fact bound claim is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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